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KHAIRUDDIN ABU HASSAN v. WAN AEIDIL WAN ABDULLAH & ORS

HIGH COURT MALAYA, KUALA LUMPUR
QUAY CHEW SOON J
[SUIT NO: WA-21NCvC-34-05-2018]
B 24 AUGUST 2022

Abstract – *An award for false imprisonment should lie somewhere in between an award for death in custody, on the one hand, and an award for defamation, on the other hand. The rationale being that loss of liberty for a period of time is less severe than loss of life whilst in detention but more serious than injury to reputation in being defamed. Damages are at large and the range of damages awarded for death in custody and defamation cases is rather varied as each case must be determined based on its own facts and circumstances.*

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D

TORT: *Unlawful detention – Damages – Claim for – Claimant vocal in speaking out about 1MDB issue – Claimant lodged reports in countries involved in 1MDB issue – Complainant lodged police report on claimant's actions – Claimant arrested and detained twice – Whether arrest warranted – Whether there was 'credible information' or 'reasonable suspicion' in causing arrest – Whether there was unlawful detention – Whether claim for damages proven*

E

TORT: *Malicious prosecution – Damages – Claim for – Claimant vocal in speaking out about 1MDB issue – Claimant lodged reports in countries involved in 1MDB issue – Complainant lodged police report on claimant's actions – Claimant arrested under s. 4(1) of Security Offences (Special Measures) Act 2012 and charged under s. 124L of Penal Code – Whether there was malicious prosecution – Whether criminal law set in motion against claimant – Whether proceedings terminated in claimant's favour – Whether there was any reasonable or probable cause for setting law in motion against claimant – Whether act actuated by malice – Whether there was motive other than to carry law into effect – Whether claimant suffered damages*

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This was the plaintiff's action against the defendants for unlawful detention and malicious prosecution. The plaintiff was a politician who was vocal in speaking out about the 1MDB issue and had lodged a police report requesting the police to investigate the affairs of 1MDB ('police report'). The plaintiff viewed that no action was taken on his police report. He subsequently made trips to several foreign countries, namely France, Switzerland, England, Hong Kong and Singapore, to meet with the enforcement agencies there and lodged reports in those countries. The plaintiff's actions were reported by the media and the complainant who had read the media report about the plaintiff's trips abroad, lodged a police report ('complainant's police report').

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In the afternoon of 18 September 2015, the plaintiff received a telephone call from the Commercial Criminal Investigation Department, Bukit Aman Headquarters. He was told to give a statement to the police at 2pm on 21 September 2015 regarding his police report. However, before he could keep that appointment in the evening of the same day *ie*, 18 September 2015, he was arrested by the first defendant on suspicion of having committed an offence under s. 124C of the Penal Code ('PC') ('first arrest'). The first defendant testified that he received the instructions to arrest the plaintiff because of the complainant's police report lodged against the plaintiff. The defendants contended that the existence of the complainant's police report by itself was sufficient evidence that the requirement of arrest had been met. The plaintiff was remanded for six days. However, the prosecution decided not to proceed with charging the plaintiff in court and he was thus released on 23 September 2015. Upon being released, the plaintiff was again re-arrested by a team of police officers led by the second defendant, under s. 4(1) of the Security Offences (Special Measures) Act 2012 ('SOSMA'), for an offence under ss. 124K and 124L of the PC ('second arrest'). The plaintiff stated that for the second arrest, he was never properly informed of the details or grounds for his arrest. On the next day, the plaintiff was served with a copy of the detention under s. 4(5) of SOSMA. It was stated therein that the plaintiff would be detained for 28 days where there could be no bail and trial. The plaintiff was charged with an offence under s. 124L of the PC. However, the High Court ruled that s. 124L of the PC did not fall within the ambit of the SOSMA. The plaintiff was released on bail. At this point, the plaintiff had been detained under SOSMA for 56 days, *ie,* from 23 September 2015 until 18 November 2015. The High Court's decision was affirmed by the Court of Appeal. The plaintiff alleged that the defendants had abused their powers to cause unlawful detention and malicious prosecution against him to help cover up the unlawful activities of Dato' Sri Mohammad Najib Tun Abdul Razak, the then Prime Minister of Malaysia, Minister of Finance and the Chairman and 1MDB. The plaintiff in this action sought (i) general damages of RM1,581,000 for false imprisonment; (ii) general damages of RM14,764,500 for malicious prosecution; (iii) exemplary damages of RM2.6 million; (iv) aggravated damages of RM1 million; and (v) special damages of RM795,000 for legal fees in defending the proceedings instituted by the defendants against him.

Held (allowing claim for unlawful detention; dismissing claim for malicious prosecution):

(1) The test to determine if an arrest is warranted depends on whether the defendants had, at the material time, 'credible information' or 'reasonable suspicion' in causing the arrest. However, from the complainant's police report, there was no material that warranted such arrest against the plaintiff for an offence under s. 124C of the PC, namely

A with regard to 'an activity detrimental to parliamentary democracy or does any act preparatory theretho'. This was fortified by the subsequent action of the defendants in deciding not to proceed with charging the plaintiff under s. 124C of the PC. Parliamentary democracy is a system of government in which citizens elect representatives to a legislative B Parliament to make laws for the country. There was nothing in the complainant's police report which suggested that the plaintiff was doing something detrimental to parliamentary democracy or, for that matter, to Parliament. The plaintiff had established that his first arrest and detention for six days, from 18 September 2015 until 23 September C 2015, was unlawful. (paras 22, 26, 30 & 31)

(2) The defendants had unlawfully arrested and detained the plaintiff under the SOSMA when the plaintiff was not investigated under an offence which fell within the ambit of the SOSMA. The defendants' witnesses throughout the trial had failed to justify the reason why the plaintiff had D to be arrested and remanded under the SOSMA. The defendants' witnesses had failed to give evidence in court as to the reason the plaintiff had to be investigated for an offence under ss. 124K or 124L of the PC. The power given to the police under s. 4(5) of the SOSMA should be exercised with great care and sparingly. It must not be abused as it encroaches on the fundamental liberties under arts. 5, 9, 10 and 13 E of the Federal Constitution. Therefore, the detention of the plaintiff (for the second arrest) was unlawful. (paras 42, 43 & 55)

(3) To succeed in his action for malicious prosecution, the plaintiff must prove five essential elements: (i) the defendant had set the criminal law F in motion against the plaintiff; (ii) the proceedings terminated in the plaintiff's favour; (iii) the defendant did not have any reasonable or probable cause for setting the law in motion against the plaintiff; (iv) the defendants were actuated by malice in the sense that they had a motive other than to carry the law into effect; and (v) the plaintiff suffered G damage. In the present case, it was undisputed that the plaintiff was charged under s. 124L of the PC and was acquitted on 12 May 2017. Thus, the first and second elements were fulfilled. In respect of the third element, the court was satisfied that the offence charged against the plaintiff under s. 124L of the PC was made without reasonable and probable cause. In respect of the fourth element, however, the court was H not convinced that the defendants were actuated by malice in the sense that they had a motive other than to carry the law into effect. The plaintiff failed to prove on a balance of probabilities, malice on the part of the defendants. (paras 71-74, 85 & 92)

I

(4) The claim of RM1,581,000 was exorbitant. No doubt that the plaintiff was entitled to general damages for his false imprisonment. However, the amount of damages must be reasonable and not excessive. The plaintiff's claim of RM30,000 per day of 62 days of unlawful detention was derived from the High Court case of *Abd Malek Hussin v. Borhan Hj Daud & Ors.* A lump sum award would be appropriate in the present case. This avoided a mathematical calculation using an arbitrary sum, whether it be RM25,000 to RM30,000 or any other figure. It also had the advantage of not having to do a downward or upward adjustment whether 30% or 15% or any other arbitrary percentage. The court had taken into account relevant factors including the plaintiff's loss of liberty, length of his detention and injury to his reputation. Considering the circumstances of the case, a lump sum of RM300,000 would be reasonable as compensation for the plaintiff's false imprisonment. Given the court's finding on the issue of liability for malicious prosecution, it was unnecessary to assess this head of damages. (paras 97, 98, 103 & 108)

(5) It was not explained how the sum of RM2.6 million was arrived at for the claim of exemplary damages. The defendants did not act vindictively or maliciously against the plaintiff. Their actions could hardly be described as oppressive or arbitrary. There was no cause to signify disapproval, condemnation or denunciation of the defendants' conduct by punishing them with punitive damages. The circumstances of this case did not warrant an award of exemplary damages. (paras 109 & 114)

(6) It was not explained how the sum of RM1 million was arrived at for the claim of aggravated damages. For an award of aggravated damages, there must be exceptional or contumelious conduct or motive on the part of the defendants. There was no such conduct or motive on the part of any of the defendants. The circumstances of this case did not justify an award of aggravated damages. The defendants may have been misguided or overzealous in invoking the legal process against the plaintiff but it could hardly be said that their pursuit of the charge against the plaintiff was accompanied by malevolence, spite, malice, insolence or arrogance. (paras 116 & 120-121)

(7) Firstly, special damages must be pleaded and particularised. The plaintiff's amended statement of claim however did not contain any particulars of these special damages claim. Secondly, these special damages claim was not strictly proved. No retained agreement between the plaintiff and his solicitors was tendered to show the basis of charging or calculating legal fees. All that was produced was the fee letter which only came into existence after the criminal case against the plaintiff had ended. The fee letter stated that parties had discussed and agreed to the

A legal fees. It was unclear when such discussion and agreement took place. The claim for special damages was rejected on the grounds that it was not specifically pleaded nor strictly proven. (paras 123, 127 & 130)

Case(s) referred to:

B *A v. State of New South Wales & Anor [2007] HCA 10* ***(refd)***
Abd Malek Hussin v. Borhan Hj Daud & Ors [2008] 1 CLJ 264 HC ***(dist)***
Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***
Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC ***(refd)***
Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd
C *Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC* ***(refd)***
Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***
Mohamad Izaham Mohamed Yatim v. Norina Zainol Abidin & Ors [2015] 7 CLJ 805 HC ***(refd)***
Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***
D *PP v. Khairuddin Abu Hassan & Anor [2017] 4 CLJ 701 CA* ***(refd)***
Rawther v. Abdul Kareem [1966] 1 LNS 154 FC ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors [2014] 9 CLJ 225 HC ***(refd)***
Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors & Another Appeal [2017] 1 LNS 500 CA ***(refd)***
E *Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman & Anor [1999] 1 LNS 83 HC* ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tan Harry And Another v. Teo Chee Yeow Aloysius And Another [2004] 1 SLR(R) 513 ***(refd)***
Tan Lin Siew & Anor v. Syed Hussein Alwi [1987] 2 CLJ 114; [1987] CLJ (Rep) 362
F *SC* ***(refd)***
Thompson v. Commissioner of Police of the Metropolis [1997] 2 All ER 762 ***(refd)***
Yang Salbiah & Anor v. Jamil Harun [1981] 1 LNS 106 FC ***(refd)***
Zaidah Ismail v. Inspektor Rabiatul Adawiayah Mohd Noor & Ors And Another Appeal [2021] 10 CLJ 876 CA ***(refd)***

G **Legislation referred to:**
Civil Law Act 1956, s. 7
Criminal Procedure Code, ss. 23(1)(a), 51A(1)(b), 117
Evidence Act 1950, ss. 101, 102, 103, 114(g)
Federal Constitution, arts. 5, 9, 10, 13, 145(3)
Government Proceedings Act 1956, s. 6(3)
H Penal Code, ss. 124C, 124K, 124L
Police Act 1967, s. 32
Security Offences (Special Measures) Act 2012, s. 4(1), (2), (3), (5)

For the plaintiff - Mohamed Haniff Khatri & Nasbal Harun; M/s Haniff Khatri
For the defendants - Andi Razalijaya A Dadi, SFC & Mohd Ashraf Abd Hamid, FC

I *Reported by Lina E*

JUDGMENT

Quay Chew Soon J:

Introduction

[1] The plaintiffs ("P") action against the defendants is for unlawful detention and malicious prosecution. After a full trial, I allowed P's claim for unlawful detention but dismissed his claim for malicious prosecution. Here are the grounds of my judgment.

Trial

[2] The witnesses who testified at the trial were:

Witness	Name	Description
	Plaintiff	
PW1	Mohamed Haniff bin Khatri Abdullah	Counsel for Plaintiff
PW2	Khairuddin bin Abu Hassan	Plaintiff
	Defendants	
DW1	DSP Wan Aeidil bin Wan Abdullah	1st Defendant
DW2	ACP Habibi bin Majinji	3rd Defendant
DW3	Dato' Masri bin Mohd Daud	5th Defendant

The Defendants

[3] The first defendant ("D1") was a senior police officer with the rank of Assistant Superintendent of Police (ASP) at the material time. He served as an Investigating Officer in the Criminal Investigation Unit, Criminal Investigation Department, Royal Malaysian Police Headquarters, Bukit Aman, Kuala Lumpur.

[4] The second defendant ("D2") was a senior police officer with the rank of Assistant Superintendent of Police (ASP) at the material time. He served as an Investigating Officer at the Criminal Investigation Unit, Criminal Investigation Department, Royal Malaysian Police Headquarters, Bukit Aman, Kuala Lumpur.

[5] The third defendant ("D3") was a police officer with the rank of Police Superintendent at the material time. He served as Deputy Chief at the Dang Wangi District Police Headquarters, Jalan Dang Wangi, Kuala Lumpur.

[6] The fourth defendant ("D4") was the Inspector General of Police at the material time. He was the person responsible for the actions of D1, D2 and D3.

[7] The fifth defendant ("D5") was a Deputy Public Prosecutor at the material time. He was the person responsible for conducting the prosecution against P at the Kuala Lumpur Magistrate Court and High Court.

[8] The sixth defendant ("D6") was a Deputy Public Prosecutor at the material time. He was the person responsible for conducting the prosecution against P at the Court of Appeal and Federal Court.

[9] The seventh defendant was the Attorney General of Malaysia at the material time. He was the person responsible for the actions of D4, D5 and D6.

[10] The eighth defendant is the Government of Malaysia. It was the employer of all the other defendants at the material time.

Background Facts

[11] P is a politician who was vocal in speaking out about the 1MDB issue. He lodged a police report on 12 December 2014 requesting the police to investigate on the affairs of 1MDB ("P police report"). An excerpt of the P police report reads:

> Setelah membaca, meneliti dan mengkaji pelbagai laporan-laporan atau pendedahan mengenai kepincangan pentadbiran kewangan syarikat 1MDB melalui artikel-artikel yang ditulis di dalam akhbar-akhbar tempatan, luar negara serta blog-blog telah membuktikan secara jelas berbagai kelemahan di dalam system meminjam dana mahupun cara perbelanjaan dana yang amat meragukan khususnya membabitkan wang rakyat.
>
> Oleh yang demikian, saya secara sukarela ingin membuat laporan rasmi **memohon Polis DiRaja Malaysia untuk menyiasat** secara mendalam dan menyeluruh terhadap kakitangan pentadbiran, para pegawai, Ahli-ahli Lembaga Pengarah serta juga keseluruhan personaliti ataupun mana-mana syarikat yang terbabit dengan urus-niaga meragukan dengan 1MDB.
>
> Polis DiRaja Malaysia mestilah menyiasat secara telus, adil dan saksama demi untuk memelihara integriti agar sejumlah wang rakyat yang besar tidak diselewengkan atau tidak disalah urus. (emphasis added)

[12] P viewed that no action was taken on his P police report. He subsequently made trips to several foreign countries to meet with the enforcement agencies there. Namely France, Switzerland, England, Hong Kong and Singapore. He lodged reports in those countries hoping that the authorities there would investigate the matter. Since the 1MDB issue involved entities and institutions in those countries.

[13] P's action was reported by the media. A complainant by the name of Mohammad Faisal bin Abu Shuaib Khan, who had read the media report about P's trips abroad, lodged a police report on Friday 18 September 2015 at 9.45am ("complainant police report").

[14] On the afternoon of that same day *ie*, Friday 18 September 2015, P received a telephone call from one ASP Cheh from the Commercial Criminal Investigation Department, Bukit Aman Police Headquarters. P was told to give a statement to the police at 2pm on Monday 21 September 2015 regarding his P police report. This new appointment was rescheduled from a previous appointment which had originally been fixed at 11am on Monday 21 September 2015. Before he could keep that appointment, at around 6pm (or 7.30pm according to D1) on Friday 18 September 2015, P was arrested by D1 at his residence's car park on suspicion of having committed an offence under s. 124C of the Penal Code.

[15] The chronology of salient events pertaining to P's arrest and detention is as follows:

No	Date	Event
1.	12.12.2014	P lodged his P Police Report at the Dang Wangi police station.
2.	1.7.2015	P and his personal lawyer, Matthias Chang Wen Chieh ("Matthias") went to Paris, France and handed over a copy of the P Police Report to Mr. Regis Ponnelle, Chief Police Officer for the Criminal Division of Economics & Finance.
3.	18.8.2015	P and Matthias went to Switzerland and handed over a copy of the P Police Report to the office of the Attorney General of Switzerland.
4.	19.8.2015	P and Matthias went to England and handed over a copy of the P Police Report to Metropolitan Police Station, Charing Cross, United Kingdom.
5.	2015	P also went to Hong Kong and Singapore on his own to hand over a copy of the P Police Report to the authorities in those 2 countries.
6.	18.9.2015	P was arrested by a team of police officers led by D1 and was brought to the Dang Wangi police headquarters. P was later handed over to D2 for an investigation under section 124C of the Penal Code.
7.	19.9.2015	P was brought before the Kuala Lumpur Magistrate Court. An order for a remand detention of 6 days under section 117 of the Criminal Procedure Code ("CPC") was issued by the Magistrate.

8.	23.9.2015	P was brought before the Magistrate and was released from the remand order. P was again arrested by a team of police officers led by D2 under section 4(1) of the Security Offences (Special Measures) Act 2012 ("SOSMA") for offences under sections 124K and 124L of the Penal Code. P was served with the Notification Form for the Grounds of Arrest under section 4(2) of SOSMA.
9.	24.9.2015	P, accompanied by his team of lawyers, was brought before D3. D2 appeared for the police and applied for P to be detained for 28 days under SOSMA. D3 issued an order of detention for 28 days. P was served with the Notice of Detention under section 4(5) of SOSMA.
10.	28.9.2015	P's solicitors filed an application for *habeas corpus* in the Kuala Lumpur High Court to challenge P's detention under SOSMA. The *habeas corpus* application was fixed for hearing on 13.10.2015.
11.	12.10.2015	P was brought before the Magistrate for the charge to be read against him. P instructed his solicitors to withdraw the *habeas corpus* application because it had become academic 1 day before the *habeas corpus* hearing.
12.	12.10.2015	P was charged with an offence under section 124L of the Penal Code. The charge proceedings was led by D5. P's solicitors raised legal issues that the charge sheet does not contain any reference to SOSMA, which were dismissed by the Magistrate who then refused bail. The Magistrate fixed a mention date on 26.10.2015.
13.	12.10.2015	P's solicitors wrote to the Deputy Registrar of the Kuala Lumpur High Court and sought to review the decision of the Magistrate's decision above. The High Court instructed P's solicitors to file a review application under section 323 of the CPC.
14.	13.10.2015	P's solicitors filed a Notice of Motion to the High Court for orders, among others, that the charge under section 124L of the Penal Code does not fall within the ambit of SOSMA. The Notice of Motion was fixed for hearing on 19.10.2015.
15.	19.10.2015	The High Court directed that the motion be referred to the Federal Court.

16	3.11.2015	The Federal Court transferred back the matter to be disposed off at the High Court first.
17.	5.11.2015	Hearing of the motion at the High Court.
18.	18.11.2015	The High Court ruled that the charge against P does not fall under SOSMA. P was released on bail.
19.	13.11.2016	The Court of Appeal dismissed the Prosecution's appeal and affirmed the High Court decision dated 18.11.2015.
20.	27.4.2017	The Federal Court struck out the Prosecution's appeal due to breach of Rule 88 of the Rules of the Federal Court 1995.
21.	12.5.2017	The Prosecution, through D6, informed the Sessions Court that it did not wish to proceed with the charge against P and asked for an order of DNAA (Discharge not amounting to acquittal). Upon application by P's solicitors, P was granted an acquittal.

[16] From the time P made his P police report on 12 December 2014 and until he was acquitted on 12 May 2017, Dato' Sri Mohammad Najib bin Tun Abdul Razak ("Najib") was the Prime Minister of Malaysia, Minister of Finance and Chairman of 1MDB. P alleges that the defendants had abused their powers to cause unlawful detention and malicious prosecution against him, to help cover up the unlawful activities of Najib, as the then Prime Minister of Malaysia, Minister of Finance and Chairman of 1MDB.

Decision

[17] Whoever desires the court to give judgment as to any right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. (See ss. 101, 102 and 103 of the Evidence Act 1950). The burden of proof lies on P. It is my finding that P has proven, on a balance of probabilities, his claim for unlawful detention. But I find that P has not proven, on a balance of probabilities, his case for malicious prosecution. Here are my reasons.

Unlawful Detention

The First Arrest And Detention

[18] It is undisputed that P was arrested on 18 September 2015 for an offence under s. 124C of the Penal Code and was remanded for six days. Namely from 18 September 2015 until 23 September 2015 ("first arrest"). The prosecution decided not to proceed with charging P in court under s. 124C of the Penal Code and therefore, P was released on 23 September 2015.

[19] D1 was the police officer that arrested P on 18 September 2015. D1 testified that he received instruction to arrest P because of the complainant police report lodged against P.

[20] It is interesting that P was arrested on the very same day that the complainant police report was lodged. The complainant police report was lodged at 9.45am on Friday 18 September 2015. P was arrested at around 6pm (or 7.30pm according to D1) on that same day.

[21] It is also interesting that on the afternoon of that same day *ie*, Friday 18 September 2015, P received a telephone call asking him to give a statement to the police on Monday 21 September 2015 at 2pm regarding his P police report (which was originally scheduled at 11am on Monday 21 September 2015). But before P could keep that appointment, the first arrest took place.

[22] The defendants contend that the existence of the complainant police report by itself is sufficient evidence that the requirement of arrest had been met. I disagree. The test to determine if an arrest is warranted depends on whether the defendants had at the material time 'credible information' or 'reasonable suspicion' in causing the arrest.

[23] Section 23(1)(a) of the CPC reads:

> 23. When police or penqhulu may arrest without warrant
>
> (1) Any police officer or penghulu may without an order from a Magistrate and without a warrant arrest:
>
> (a) any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or **credible information has been received or a reasonable suspicion exists** of his having been so concerned; (emphasis added)

[24] During cross-examination, D1 confirmed that the first arrest was for an offence under s. 124C of the Penal Code.

> Q: ... Saya nak ambil perhatian awak kepada soalan nombor 8. Encik DSP Wan, sila rujuk kepada pernyataan awak soalan 8. Soalannya adalah apakah tujuan utama Plaintif ditangkap? Dan jawapan awak adalah Plaintif telah ditangkap bagi tujuan siasatan lanjut oleh pihak polis kerana disyaki secara syak dan munasabah telah melakukan kesalahan di bawah Seksyen 124C Kanun Keseksaan. Ini jawapan awak, betul?
>
> A: Betul.
>
> Q: Jadi, pada masa ini, pada masa itu awak tahulah apa itu Seksyen 124C Kanun Keseksaan?

A: Seksyen 124C adalah aktiviti yang menganggu atau menggugat demokrasi berparlimen.

Q: Demokrasi berparlimen, tepat sekali. Seksyen 124C adalah khusus bagi aktiviti-aktiviti yang menggugat demokrasi berparlimen. Dan bila awak diminta atau **diarahkan untuk membuat tangkapan** di bawah Seksyen 124C itu, kalau mengikut Penyata Saksi awak, awak telah **diarahkan oleh pegawai atasan awak. ACP Mokhtar** ya?

A: ACP Mokhtar bin Md Noor. (emphasis added)

[25] Section 124C of the Penal Code reads:

124C Attempt to commit activity detrimental to parliamentary Democracy

Whoever attempts to commit an **activity detrimental to parliamentary democracy** or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years.

(emphasis added)

[26] From the complainant police report, I do not see any material that warrants such arrest against P for an offence under s. 124C of the Penal Code. Namely with regards to "an activity detrimental to parliamentary democracy or does any act preparatory thereto". This is fortified by the subsequent action of the defendants in deciding not to proceed with charging P under s. 124C of the Penal Code in court.

[27] On the face of it, the complainant police report itself appears rather innocuous. The complainant said that on Thursday 17 September 2021 at approximately 7.45pm, he was at a restaurant surfing the internet on his mobile phone. He chanced upon an article posted on P's Facebook. In that Facebook posting, P talked about the French police taking action on his report. The complainant believed the contents of the said article to be false and which might lead to a public emergency. The very next morning at 9.45am on Friday 18 September 2021, he lodged the complainant police report.

[28] An excerpt of the complainant police report reads:

Pengadu Menyatakan:

Pada 17/09/2015 jam lebih kurang 1945hrs semasa saya berada di restoran makan di KTMB Kuala Lumpur telah melayari internet Facebook mengunakan telefon bimbit milik saya jenis Samsung Note 5 telah terbaca satu artikel posting penama pemilik akaun Facebook – Khairuddin Abu Hassan – yang bertajuk – *Polis Peranchis Mula Bertindak Ke Atas Laporan Saya Mengenai Skandal 1MDB* – di URL : https://www.facebook.com/379029638934666/photos/a.459015744269388.1073741827.379029638934666486220801548882/ yang di posting pada 21 Ogos 2015 jam lebih kurang 1227 hrs yang mendapat 3645 likes pada posting artikel tersebut. Dalam kenyataan artikel tersebut ada kandungan yang menyatakan – sebagai contohnya, asas siasatan PDRM telah dipesongkan kepada

siasatan keatas justo yang ditangkap di Thailand, clare brown editor Sarawak report dan beberapa pegawai SPRM serta BNM disoal-siasat!! Empat orang anggota PAC pula dilantik sebagai timbalan-timbalan menteri secara tiba-tiba yang akhirnya membantutkan struktur serta proses siasatan oleh PAC – pada pendapat saya, kenyataan artikel tersebut adalah dipercayai palsu atau membuat kenyataan palsu yang berkemungkinan menyebabkan kecemasan awam, saya buat laporan polis adalah untuk siasatan pihak polis. Sekian laporan saya.

[29] The concept of parliamentary democracy lies primarily on the notion that the ultimate responsibility of making laws rest with Parliament, members of whom are elected by the people. In *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, the Court of Appeal observed (at p. 193):

> There is nothing startling in the trial judge holding the first and fourth defendants to be fiduciaries in public law. *In a system of Parliamentary democracy modelled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation.* The donee of the power – the public body – may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. (emphasis added)

[30] Parliamentary democracy is a system of Government in which citizens elect representatives to a legislative Parliament to make laws for the country. I do not detect anything in the complainant police report which suggests that P was doing something detrimental to parliamentary democracy (or for that matter, to Parliament). Not that I would presume to usurp the role of the police in their investigative work. But this was agreed to by D1 in cross-examination.

> Q: Soalan saya, ada tak dalam laporan ini dia mengatakan apa yang dia kata dia baca artikel Khairuddin itu menyebabkan menggugat perjalanan demokrasi berparlimen. Ada dia kata? Ada ke tidak dia kata? Itu soalan saya. **Dalam laporan ni, kenyataan yang mengatakan bahawa dia membaca, ada kandungan yang menggugat perjalanan demokrasi berParlimen.** Ada atau tidak?
>
> A: Dia tak kata.
>
> Q: Baik. Kemudian, saya nak rujuk kepada aduan dia yang dia kata sebagai contohnya, asas siasatan PDRM telah dipesongkan kepada siasatan ke atas Justo yang ditangkap di Thailand. Setuju tak ini berkaitan dengan tangkapan seorang individu? Justo ni bukan rakyat Malaysia pun. Setuju?
>
> A: Setuju.
>
> Q: Setuju atau tidak Justo ni bukan wakil rakyat di Parlimen pun? Setuju?
>
> A: Setuju.

Q: Jadi maksudnya, Justo ni tak boleh tergolong dalam Parlimen di Malaysia. Setuju? A

A: Memang betul. Setuju.

Q: Tambahan pula dikatakan tangkapan di Thailand. Dan Thailand tidak berada dalam Dewan Parlimen Malaysia. Betul? B

A: Betul.

Q: Seterusnya, Claire Brown editor Sarawak Report - Claire Brown - adakah - setuju atau tidak bahawa beliau juga bukan mana-mana ahli Parlimen di dalam Malaysia atau pun DUN di mana-mana negeri? C

A: Setuju.

Q: Dan kemudian dinyatakan beberapa pegawai SPRM serta BNM disoal-siasat. Pegawai SPRM dan BNM bukannya sebahagian daripada demokrasi berparlimen. Setuju? D

A Setuju.

Q: Kemudian dikatakan empat orang anggota PAC dilantik sebagai Timbalan-Timbalan Menteri secara tiba-tiba yang akhirnya membantutkan struktur serta proses siasatan oleh PAC. PAC ni cuma sebahagian daripada satu entiti kecil daripada Parlimen. Setuju? E

A: Setuju.

[31] Notably, D1 testified that he arrested P pursuant to the instruction of his superior officer, one ACP Mokhtar bin Md Noor ("ACP Mokhtar"). D1 did not seem to be fully conversant with the background or reason for the first arrest of P. ACP Mokhtar was the one who had directed D1 to arrest P. ACP Mokhtar appears to be one who has intimate knowledge of the material facts relevant to the first arrest of P. It might have been helpful for me to hear ACP Mokhtar's testimony regarding the material circumstances that were peculiarly within his knowledge which led to P's first arrest. Not to mention, his evidence could have been useful to rebut P's case. However, the defendants did not call ACP Mokhtar to testify on the issue of P's first arrest and the detention that ensued. The defendants could have called ACP Mokhtar to give evidence that there was 'a reasonable complaint, credible information or reasonable suspicion' to justify the first arrest against P. But they chose not to do so. F G H

[32] I refer to the Federal Court case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 which explained the consequences that followed when a defendant refrained from giving evidence at the end of the plaintiff's case. Firstly, the evidence given by the plaintiff should be presumed to be true. Secondly, an adverse inference should be drawn against the defendant. The Federal Court held (at pp. 398 to 403): I

A [4] In our judgment, **two consequences** inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the **first** place, the **evidence given by the appellant ought to have been presumed to be true.** As Elphinstone CJ said in *Wasakah Singh Bachan Singh* [1931] 1 MC 125 at p 128:

B > **If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party,** and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. **For the**
C > **purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.**

Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: **does the first**
D **defendant/respondent have a case to answer?** This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently
E improbable. In these circumstances it was the **duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way.** He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[5] The **second consequence** is that the **court ought to have drawn an**
F **adverse inference against the first respondent** on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. **Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference.** ...

G ...

[7] In the present instance, there is no doubt that the **first respondent had intimate knowledge of the material facts relevant to the dispute** and that she was privy to the several steps through which the transaction had proceeded. Based on the authorities already cited, it is patently clear that
H the trial judge in the present case ought to have held that the **failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case** on those vital points that lay at the axis of the dispute between the parties. This, the trial judge clearly omitted to do. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon
I such a crucial point as this certainly amounts to a misdirection which has occasioned a miscarriage of justice. ...

...

[11] The Court of Appeal did not address its mind in its judgment to any of the points discussed earlier in this judgment. With respect, its approach should have been far more analytical of the facts and of the proceedings at first instance. In particular, there is, despite a recitation of the line of defence taken by the first respondent, no reference whatsoever to the **consequence of her having studiously refrained from entering the witness box.** Applying *Gurbakhsh v. Gurdial* AIR [1927] PC 230, it was her bounden **duty to have informed the trial court of all the material circumstances that were peculiarly within her knowledge.** The Court of Appeal does not appear to have noticed this aspect of the case at all. With respect, its judgment is, in this respect, equally flawed as that of the trial judge.

(emphasis added)

[33] P invited me to draw an adverse inference against the defendants under s. 114(g) of the Evidence Act 1950. Owing to the defendants' failure to call a material witness (*ie*, ACP Mokhtar) and their failure to provide adequate reason for not calling the said material witness.

[34] P cited the Supreme Court case of *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 which held that failure to adduce a material witness without any justification invites an adverse inference against the party who committed the said failure. The Supreme Court said (at p. 158):

It must be appreciated in this case that the learned trial judge had only the evidence adduced on behalf of the respondents and documents which speak for themselves. DW1 had no personal knowledge of what went on in respect of the transaction involving the two machines. It was not disputed that an important official of the appellants involved in the transactions was in fact one Bart Chew who signed the documents P1E and P2E. DW1 also stated that Mr Mah Kim, the financial controller of the appellant company, must also sign the certificate but Mr Mah Kim was not called to give evidence. Another person who should also have first hand knowledge of the transaction was one Mr Lazar Fredericks who was the credit controller of the appellant company at the material time. Mr Lazar Fredericks' duty was to monitor the payments and to chase customers for money in respect of equipment sold by the appellants. He was also not called to give evidence.

No reasons were given why all these persons were not called to give evidence. The learned trial judge invoked s. 114(g) of the Evidence Act 1950 against the appellants and we think he was quite correct under the circumstances to do so.

[35] I decline to draw an adverse inference against the defendants. It has not been shown that the defendants had suppressed material evidence or withheld a material witness. It was open to P to call ACP Mokhtar if he wished. There is no property in a witness.

[36] Nevertheless, I agree with P that based on the complainant police report, there is nothing that warrants P to be arrested for an offence under s. 124C of the Penal Code. The defendants failed to adduce any evidence to rebut the same, in the absence of the testimony of ACP Mokhtar that 'a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists'. In the premises, I find that P has established that his first arrest and detention for six days from 18 September 2015 until 23 September 2015 is unlawful.

The Second Arrest And Detention Under SOSMA

[37] It is also undisputed that upon P being released on 23 September 2015, he was again rearrested by a team of police officers led by D2 at the court's corridor, under s. 4(1) of SOSMA for an offence under ss. 124K and 124L of the Penal Code ("second arrest"). The notification form for the grounds of arrest under s. 4(2) of SOSMA dated 23 September 2015 had only stated 'Sections 124K and 124L of the Penal Code'. An excerpt thereof reads:

BORANG PEMBERITAHUAN ALASAN TANGKAP
SEK. 4(2) AKTA KESALAHAN KESELAMATAN (LANGKAH-LANGKAH KHAS) 2012

A) BUTIR-BUTIR KES:

i) Balai & No. Repot: THR rpt: 31165/15

ii) Alasan tangkap: dipercayai terlibat dalam kesalahan keselamatan. (contoh)
Seks: 124 K & 124 L ke Keselamatan

B) BUTIR-BUTIR ORANG YANG DITANGKAP (OKT):

Nama: Khairuddin Abu Hassan

No. KP: 620204-07-5741

Alamat: 33-1, 1-2EN, MONT KIARA, K/L

C) PEMBERITAHUAN OLEH PEGAWAI POLIS:

Mengikut kehendak Seksyen 4(2) Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012, saya, Insp Muniandy A[illegible] (pkt./no./nama) telah memaklumkan kepada OKT alasan tangkap seperti di atas dalam Bahasa Melayu yang difahami olehnya / dalam Bahasa Melayu yang diterjemahkan oleh — (pkt/no./nama penterjemah) ke Bahasa ..... yang difahami oleh OKT.

[38] P avers that he was never properly informed of the details or grounds for his arrest. Subsequently on the next day 24 September 2015, P was served with a copy of the notice of detention under s. 4(5) of SOSMA. It was stated therein that P would be detained for 28 days where there can be no bail and trial. P's solicitors filed an application for *habeas corpus* on 28 September 2015 and the *habeas corpus* hearing was fixed on 13 October 2015. P then was brought before the Magistrate on 12 October 2015, one day before the *habeas*

corpus hearing that was scheduled on 13 October 2015. This caused P's solicitors to withdraw the *habeas corpus* application as it had become academic on 13 October 2015.

[39] P was charged with an offence under s. 124L of the Penal Code which reads:

> 124L **Attempt to commit sabotage**
>
> Whoever **attempts to commit sabotage** or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years. (emphasis added)

[40] According to the charge sheet, the attempt to commit sabotage was against the country's banking and financial services. It reads:

> **Pertuduhan**
>
> Bahawa kamu antara 28 Jun 2015 hingga 26 Ogos 2015 dibeberapa lokasi iaitu
>
> a) diPejabat Ketua Palis Bahagian Jenayah Ekonomi dan Kewangan Paris, Perancis,
>
> b) Balai Polis Charing Cross, London, United Kingdom,
>
> c) Pejabat Peguam Negara Switzerland, Bern, Switzerland,
>
> d) Balai Polis WaiChan, Hong Kong dan
>
> e) Ibu Pejabat Polis Cantoment, Singapura
>
> bagi mencapai niat bersama, kamu telah melakukan dengan niat, cubaan melakukan sabotaj terhadap perkhidmatan perbankan dan kewangan negara dan dengan itu kamu telah melakukan suatu kesalahan dibawah Seksyen 124L Kanun Keseksaan (Akta 574) dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[41] On 18 November 2015, the High Court ruled that s. 124L of the Penal Code does not fall within the ambit of SOSMA. P was then released on bail. At this juncture, P had been detained under SOSMA for 56 days from 23 September 2015 until 18 November 2015. The aforesaid High Court decision was affirmed by the Court of Appeal on 13 November 2016.

[42] It is my finding that the defendants had unlawfully arrested and detained P under SOSMA, when P was not investigated under an offence which falls within the ambit of SOSMA. The defendants' witnesses throughout the trial have failed to justify the reason why P had to be arrested and remanded under SOSMA. The defendants' witnesses had failed to give evidence in court as to the reason P had to be investigated for an offence under ss. 124K or 124L of the Penal Code.

[43] The power given to the police under s. 4(5) of SOSMA should be exercised with great care and sparingly. It must not be abused as it encroaches on the fundamental liberties under arts. 5, 9, 10 and 13 of the Federal Constitution. This was enunciated by the Court of Appeal in *PP v. Khairuddin Abu Hassan & Anor* [2017] 4 CLJ 701 at p. 714:

> [33] From the statements by the Minister, it is crystal clear that the purpose and **objective of SOSMA is to combat terrorism.**
>
> [34] We next made reference to the internal aid namely the preamble, the scheme and the provisions of SOSMA. The preamble of SOSMA as set out above shows that SOSMA was enacted to deal with four out of the six categories of action under art. 149(1). The scheme and the provisions of SOSMA were designed to **limit the fundamental liberties** under arts. 5, 9, 10, and 13 of the Federal Constitution and to depart from the procedures laid down under the Criminal Procedure Code, the law which governs the conduct of criminal cases. Although SOSMA merely regulates the trial of the offences and does not create the said offences (see *PP v. Yazid Sufaat & Ors* [2014] 2 CLJ 670; [2015] 1 MLJ 571), undoubtedly a person charged and tried under SOSMA will **lose his liberty** as he will be denied bail. In this regard, the learned judge was of the view that in interpreting SOSMA the **court should be guided by the principle of giving full recognition to the fundamental rights and freedom.** We found no error in the approach taken by the learned judge.

[44] Despite being given such power (that exceeds judicial power conferred on a Magistrate for remand under s. 117 of the CPC), D3 ordered the 28 days remand against P without even knowing the nature of the offence purportedly committed by P. The following transpired during the cross-examination of D3.

> Q: Dan bila awak tengok permohonannya adalah seksyen 124K dan 124L, maka awak **perlu lihat semua dokumen ini dan membuat satu analisa** dalam minda awak, **adakah terdapat asas untuk terus menyiasat di bawah 124K dan L seperti yang dipohon.** Setuju? Itu tanggungjawab awak juga.
>
> A: Maksudnya, dia nak tunjukkan? (emphasis added)
>
> Q: Maksudnya, bila permohonan 124K dan L, maka awak kena tengoklah semua ni. Nak tengok perlu ke tahan bawah K dan L. Betul ke di bawah K dan L? Awak mempunyai **tanggungjawab untuk selidik asas sebelum bagi perintah.** Itu saja cadangan saya. Setuju?
>
> A: **Pada masa itu, tidak.** (emphasis added)

[45] D3 contends that the 28 days remand was reasonable because the case was rather complicated, involved many witnesses whose statements had to be recorded, and documents from abroad had to be gathered. He said – "Bila kita lihat kes ni agak complicated dan melibatkan ramai saksi. Pada masa

tersebut tuan Muniandy ada memohon kepada saya untuk merakam beberapa statement rakaman percakapan saksi dan mendapatkan beberapa dokumen termasuk di luar negara untuk dikumpulkan dalam siasatan kes dia". But did D3, in having such power under s. 4(5) of SOSMA, consider the circumstances and facts of the case to ensure whether it really falls under SOSMA? It appears not.

[46] This is evident from the answers given by D3 during cross-examination that was evasive in nature and failed to give justification for the 28 days remand.

A: Yang Muniandy terangkan secara lisan. Dia memohon untuk saya melanjutkan perintah tahanan selama 28 hari berdasarkan alasan yang dia beri tadi sepertimana yang saya terangkan.

Q: Apa alasan dia?

A: Sudah saya terangkan tadi.

Q: Apa dia?

A: Antaranya dapatkan kenyataan saksi.

Q: Antaranya maksudnya ada banyak.

A: Ada dua tiga perkara lah.

Q: Dua tiga perkara, ceritakan dua tiga perkara tu.

A: Rakamkan percakapan saksi, mendapatkan dokumen-dokumen berkaitan dengan siasatan sama ada dalam negara atau luar negara dan masa yang terhad untuk menyelesaikan kes yang spesifik begini.

Q: Nak dapatkan dokumen, dokumen jenis apa? Mesti dia ada ceritakan pada awak.

A: Dokumen yang berkaitan dengan siasatan ini.

Q: Sekejap. Awak pegawai nak bagi tempoh tau. Mesti diyakinkan kepada awak what is the nature of the document di luar negara. Mesti awak diberitahu apa bentuk siasatan.

A: Ya.

Q: Jadi, sebagai pegawai yang diminta untuk melaksanakan kuasa di bawah Seksyen 4(5), awak mesti yakinkan diri awak, di bawah kategori mana yang datang ni. Mungkin kita tidak tahu lagi apakah ada elemen jenayah, tapi kita kena yakinkan dia datang di bawah mana. Setuju?

A: Setuju.

Q: Betul. Kalau kita tak yakinkan benda tu dan kita biar pegawai penyiasat je yang buat, maka kita memungkiri tanggungjawab kita sebagai pegawai yang perlu. Betul?

A: Betul.

A Q: Haa that is why I'm asking you, pada masa itu, **apakah fahaman tuan ACP akan jenayah yang dilakukan,** yang dia perlu nak ambil dokumen dari luar negara, yang dia perlu ... apa ni ... ambil rakaman percakapan dari saksi lain. Apakah dia yang ... mesti dimaklumkan. Kalau dia tak maklumkan, patut awak tolak. Jadi apa yang dia maklumkan?

B A: Yang Arif, dua tiga kali saya ada maklumkan tadi. Perkara-perkara yang dipohon oleh tuan Muniandy adalah berkaitan dengan pelanjutan 28 hari tu untuk **membantu siasatan dia bagi mendapat keterangan di bawah Seksyen 124C** tadi tu. (emphasis added)

C **[47]** From the above answers that were given by D3, it would seem that he was not fully conversant with the offence that was purportedly committed by P, much less consider whether it comes under SOSMA. According to D3, the 28 days remand applied for by D2 was for the purpose of assisting his investigation under "s. 124C". But s. 124C of the Penal Code is not the applicable provision. Instead, the applicable provisions are ss. 124K and D 124L of the Penal Code. The 'Borang Pemberitahuan Alasan Tangkap Sek. 4(2) Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012' stated 'Alasan tangkap: Sek. 124K & 124L K/Keseksaan'.

[48] D3 was not even sure what is the offence that P was being investigated E under, despite the above 'Borang Pemberitahuan Alasan Tangkap Sek. 4(2) Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012'. For sure, it was ss. 124K and 124L of the Penal Code. Not s. 124C of the Penal Code. Recall that the first arrest was made for an offence under s. 124C of the Penal Code. But the prosecution had decided not to proceed with that charge.

F **[49]** Further, D3 admitted under cross-examination that he might not have granted the remand order had he been made fully cognisant of the circumstances and facts of the case by D2.

G Q: Saya faham, Tuan ACP telah pun menyatakan dalam kenyataan saksi daripada apa yang diceritakan oleh ASP Muniandy Tuan ACP yakin untuk keluarkan remand. Soalan saya lain, soalan saya ialah *kalaulah Tuan ASP Muniandy berpeluang nak maklumkan segala rentetan peristiwa yang kita huraikan tadi dan membawa perhatian kepada Tuan ACP. Maka, ada kemungkinan Tuan ACP tidak akan memberikan rentetan* tersebut. Kerana orang yang nak disiasat telah memulakan siasatan di luar negara. Maka bagimanakah mungkin akan tercetus apa yang H dia buat menjadi *bahaya kepada demokrasi berparlimen.* Menjadi *bahaya kepada sistem kewangan* sedangkan negara luar sedang siasat. Itu sebabnya saya katakan bahawa *kalaulah perkara ini dibawa dan dimaklumkan pada Tuan ACP ada kemungkinan you may not have granted the remand order.* Itu sahaja, bukan saya kata definitely. Ada kemungkinan?

I A: *Ada kemungkinan.* (emphasis added)

[50] Clearly, the testimony of D2 (the Investigating Officer) would be crucial. But D2 was not present in court to give evidence. A brief narration is useful. The trial was fixed for three days from 26 April 2021 to 28 April 2021. When the trial began on the first day (*ie*, 26 April 2021), Senior Federal Counsel (SFC) informed me that the trial cannot be completed during these three days because D2 was unable to attend court as he had suffered a stroke. We carried on with P closing his case and the defendants calling their other witnesses. On the third day of the trial (*ie*, 28 April 2021), the matter was adjourned to a date to be fixed once D2 is well enough to attend court.

[51] Several case managements were conducted *via* email (on 28 May 2021, 28 June 2021, 27 August 2021 and 27 October 2021) for SFC to provide update concerning D2's medical condition. SFC eventually informed me that D2 is well enough to attend court. Thereupon I fixed the continued trial on 2 June 2022. More than a year had elapsed since the trial first began on 26 April 2021. When the part-heard trial continued on 2 June 2022, SFC informed me that D2 was not present in court. There was no suggestion by SFC that D2 was absent due to medical reasons (as happened previously). I stood the matter down for SFC to arrange for D2 to testify. When we resumed later in the day, SFC informed me that he was unable to contact D2 and decided to close the defendants' case. No reason was proffered to explain D2's absence from court.

[52] Similarly here, P invited me to draw an adverse inference under s. 114(g) of the Evidence Act 1950 due to the defendants' failure to produce D2 as a witness. I decline to do so as this was not a case where a material witness had been withheld. To put things in perspective, D2 was included in the list of witness filed by the defendants. In fact, D2's witness statement had been filed. And actually, D2 was present in court on an earlier occasion when the matter had been set down for trial. The matter was first fixed for trial on 1 September 2020 to 4 September 2020. (Not counting an earlier set of trial dates on 1 June 2020 to 4 June 2020, which were vacated due to the Covid-19 Movement Control Order). On the morning of the first day of trial on 1 September 2020, counsel for P requested a postponement on account of P being hospitalised. A medical certificate was later produced. SFC did not object to the postponement. But he put on record that travel expenses had been incurred for his witnesses who were present in court, one of whom was D2.

[53] Be that as it may, I think the failure of D2 to give evidence has discredited the defendants' case and strengthened P's case on the issue of his second arrest and the detention that ensued. The result is that the defendants have failed to show sufficient particulars and material evidence to justify the second arrest and detention of P under SOSMA.

[54] I refer to the Federal Court case of *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403 ("*Hassan Marsom*") which held that in a case of unlawful detention or false imprisonment, the defendant must prove that he had reasonable cause to detain the plaintiff. The Federal Court said (at pp. 452 to 453):

> [134] The basic difference between the two has been expressed to be one of presumption. While **imprisoning a man is *prima facie* wrongful**, setting the law in motion is *prima facie* right and proper. Thus, in a malicious prosecution case, the plaintiff must prove that the defendant lacked reasonable cause for the prosecution whilst **in false imprisonment it is the defendant who must prove reasonable cause.** (emphasis added)

[55] In the present case, the defendants have failed to prove reasonable cause to detain P under ss. 124K and 124L of the Penal Code. As mentioned earlier, the defendants' witnesses throughout the trial have failed to justify the reason why P had to be arrested and remanded under SOSMA. The defendants' witnesses had failed to give evidence in court as to the reason P had to be investigated for an offence under ss. 124K or 124L of the Penal Code. I therefore find the detention of P to be unlawful.

[56] I also refer to the Court of Appeal case of *Zaidah Ismail v. Inspektor Rabiatul Adawiayah Mohd Noor & Ors And Another Appeal* [2021] 10 CLJ 876 which held that the investigating officer should objectively analyse the facts to make a proper judgment whether it was necessary to arrest and detain the plaintiff. The Court of Appeal said (at pp. 894 and 898):

> [45] In the circumstances, the first defendant being the *investigating officer ought to have objectively analysed the facts to make a proper and valid judgment that it was unnecessary to arrest and detained the first plaintiff.* However, the first defendant had *failed to do so, resulting in the unlawful arrest and detention* of the first plaintiff. We find that there was *no credible information before the first defendant for any reasonable suspicion to arise* that the first plaintiff had committed a seizable offence under ATIPSOM, or for that matter under any other statute. Budi was legally in the country with full and valid documents of employment by the first plaintiff. ... We find that *no reasonable complaint has been made or credible information has been received or a reasonable suspicion exists* for the first plaintiff to be arrested and detained in respect of a seizable offence.
>
> [62] It is pertinent to note that for purposes of this appeal, s. 23 of the CPC and s. 29 of the ATIPSOM are relevant with regard to the powers of a police officer to arrest without an order of a Magistrate or without a warrant.
>
> ...
>
> [63] In this regard, whether the arrest and detention of the first plaintiff was wrongful would very much depend on whether the defendant had acted within the provision of s. 23(1)(a) of the CPC and/or s. 29 of the ATIPSOM. In order for the defendants to rely on that section the

> *defendants had to show they had reasonable or probable cause to effect the arrest in that the defendants had received credible information or held reasonable suspicion* as to the commission of an offence. We are of the view that a similar criterion applied when applying for a remand order to facilitate further investigation. (emphasis added)

[57] In the instant case. I am satisfied that no reasonable complaint has been made or credible information has been received or reasonable suspicion exists for P to be arrested and detained under SOSMA. P also was not properly informed of the particulars and grounds for his detention under SOSMA. Recall that the material upon which the defendants arrested and detained P was the complainant police report. As alluded to earlier, the complainant police report seems rather insufficient to justify arrest and detention, especially under SOSMA.

[58] Based on the totality of the evidence, I find that there was no reasonable or probable cause for P to be arrested and detained under ss. 124K or 124L of the Penal Code. There was no reason to believe that P was involved in security offences under s. 4(1) of SOSMA.

[59] I refer to the High Court case of *Abd Malek Hussin v. Borhan Hj Daud & Ors* [2008] 1 CLJ 264 at pp. 270 to 271 which said:

> [7] In my judgment, the arrest and detention of the plaintiff was unlawful for the following reasons:
>
> (a) The plaintiff was **never properly informed** by the first defendant of the **grounds of his arrest** as required under art. 5(3) of the Federal Constitution.
>
> (b) The first defendant failed to satisfy the court with **sufficient particulars and material evidence of the plaintiff's activities to justify the arrest and detention** of the plaintiff under s. 73(1) of the Internal Security Act 1960. (emphasis added)

[60] It bears reiterating that the High Court on 18 November 2015 had decided that s. 124L of the Penal Code does not fall within the ambit of SOSMA. The same was affirmed by the Court of Appeal on 13 November 2016. This reinforces my finding that the second arrest and detention of P from 23 September 2015 until 18 November 2015 under SOSMA is unlawful.

Defendants' Submission

Non-justiciability Of Remand Order

[61] The defendants contend that the remand order for six days from 18 September 2015 to 23 September 2015 is non-justiciable as it was granted by the Magistrate. The defendants say that the remand was an exercise of judicial act by the Magistrate and can only be challenged by way of criminal appeal or criminal revision by the High Court exercising criminal or

A appellate jurisdiction. The defendants argue that the act of the police in detaining P was done pursuant to the order of the Magistrate. The defendants rely on s. 32 of the Police Act 1967 which confers protection for act done under authority or warrant. The defendants also rely on s. 6(3) of the Government Proceedings Act 1956 which confers immunity to Government
B officers.

[62] However, no less an authority than the apex court has decided that a claimant is entitled to pursue the tort of unlawful detention through a civil claim. In *Hassan Marsom*, the Federal Court agreed with the Court of Appeal that "any challenge to the unlawfulness of the remand order is not limited
C to an appeal or revision under the CPC but could still be pursued if specifically pleaded in a civil action".

[63] Similar issues arose for adjudication in *Hassan Marsom* among others: (i) whether the remand order under s. 117 of the CPC may be challenged by a collateral proceeding; and (ii) the protection afforded under s. 32 of the
D Police Act 1967. In fact, the prosecution in that case advanced the same argument that it is never the function of the court in a civil claim for unlawful detention to go behind the remand order and to question its legality or the manner in which it was obtained.

E **[64]** The Federal Court in *Hassan Marsom* said (at pp. 447 to 449):

> [114] The respondent in the instant appeal had in his amended statement of claim pleaded and prayed for a declaration that his detention was unlawful and a transgression of his fundamental rights under art. 5 of the Federal Constitution. In law, he has a choice either to pursue his cause either by way of the procedures provided under Chapter XXXI of the
F CPC or by the very action he undertook in this case. He must be *allowed to have the choice of bringing an action in a civil court* as an alternative to the procedures provided under Chapter XXXI of the CPC. In fact, it would be more cumbersome on his part to adopt the procedures under the CPC and to subsequently file a claim in the civil court. A sheer waste of time and resources, we would add. The *High Court, being a court of unlimited*
G *jurisdiction has an inherent power to correct any wrong that had been done in breach of any written law and to declare the legality or otherwise of any act purportedly done or exercised pursuant to powers conferred under the law.*
>
> ...
>
H [120] The respondent's *liberty in the instant appeal had been encroached and we must intervene and declare that his detention was unlawful.* "The courts are the final arbiter between the individual and the State and between individuals *inter se*, and in performing their constitutional role, they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in
I administrative action". (emphasis added)

[65] The defendants submit that *Hassan Marsom* was wrongly decided, their argument is that the inherent power of the court does not extend to allowing a court exercising civil jurisdiction to interfere with a decision by a competent court exercising criminal jurisdiction. It is as good as there is no separation of jurisdiction of the court, according to the defendants. Even if I agreed with the defendants' argument (which I do not), *Hassan Marsom* is binding on me based on the doctrine of *stare decisis*.

[66] The defendants say that the facts in *Hassan Marsom* are distinguishable from the facts herein, in that *Hassan Marsom* involves extensive challenge to a remand order where the court found that: (i) strict requirements of remand was not followed; (ii) the Magistrate was misled by the Investigating Officer applying the remand order; (iii) there was police brutality against the detainee; and (iv) the remand process was abused. However, I do not consider the pronouncement of law by the apex court as being narrowly confined to the facts of that case. The principle of law enunciated, in my opinion, is of general application. Even if the facts are different, the principle nonetheless applies. Namely "the High Court, being a court of unlimited jurisdiction has an inherent power to correct any wrong that had been done in breach of any written law and to declare the legality or otherwise of any act purportedly done or exercised pursuant to powers conferred under the law". And a claimant "must be allowed to have the choice of bringing an action in a civil court as an alternative".

[67] The defendants invited me to analyse whether the offence under which P was investigated is a security offence or otherwise. However, the issue of whether or not s. 124L of the Penal Code falls within the ambit of SOSMA was already decided by the Court of Appeal in *PP v. Khairuddin* (*supra*). Hence, it is not a live issue to be considered by me in this action.

Non-justiciability Of Discretion To Prosecute

[68] Next, the defendants canvassed arguments concerning the non-justiciability of the discretion to prosecute under art. 145(3) of the Federal Constitution. But I think that misses the point. P here is not denying the defendant's prosecutorial authority. P is saying that the authority was abused. The Prosecutor is not immune from legal action if the prosecutorial discretion had been exercised improperly. While prosecutorial authority is constitutionally vested in the Attorney General, the prosecutorial discretion must be exercised lawfully. If the Attorney General as the custodian of prosecutorial power exercises his prosecutorial discretion for an extraneous purpose, then that decision can become justiciable and the court has a duty to render assistance to an individual who has been aggrieved by that decision. (See the High Court case of *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* [2014] 9 CLJ 225; [2014] 11 MLJ 481).

[69] I am mindful that it is not for me to second-guess a Prosecutor's judgment call. It is not the case that any and every acquitted person is allowed to institute civil proceedings against the Prosecutor or the investigating authority, on grounds of the prosecution having failed to prove its case against the accused. Such would be contrary to public policy. (See the High Court case of *Mohamad Izaham Mohamed Yatim v. Norina Zainol Abidin & Ors* [2015] 7 CLJ 805; [2017] 7 MLJ 772).

[70] I am also cognisant that it is not the function of the court to take upon itself and dictate the manner as to how the police should carry out their work. Yet, the court should not abdicate its judicial function in a case where a claimant has been unlawfully detained. I refer to the remarks of the Federal Court in *Hassan Marsom*, *albeit* in the context of police brutality and custodial assault (at p. 444):

> [105] While we agree that **it is not the function of the courts to take upon itself and dictate the manner as to how the police should carry out their investigation** works, it **does not mean that the courts should abdicate its judicial functions and seem to be wearing blinkers** oblivious to the horror stories and allegations of police brutality and custodial assaults. In this day and age of greater public awareness of police functions, **should judges simply fold their arms and declare that nothing can be done** about the complaint? The courts have been entrusted with the responsibility to ensure that prisoners and detainees are not improperly treated, let alone be assaulted and inflicted with injuries. This court must insist on civilised standards of human decency and be diligent in maintaining that standard. It is our bounden duty to do so. (emphasis added)

Malicious Prosecution

[71] To succeed in his action for malicious prosecution, P must prove at least five things. And unless he does so, he cannot succeed. This was so held by the Federal Court in *Rawther v. Abdul Kareem* [1966] 1 LNS 154; [1966] 2 MLJ 201 at 203 which said:

> Any action for malicious prosecution raises questions of difficulty. On the one hand there is the need to protect the reputation of the individual against unjustified attacks and his pocket against the expense of defending himself against unjustified criminal proceedings. On the other hand the courts have always recognised the necessity of affording protection to persons who, whatever their real motives, assist in the administration of public justice. As was said by Viscount Simonds in the case of *Glinski Mclver* [1962] AC 726 741:
>
> > in such cases as these the liberty of the subject is involved on the one side, and on the other the risk that the citizen in the performance of his duty may be embarrassed if a jury too readily gives a verdict in favour of a plaintiff who has been prosecuted and acquitted.

> In any such action the plaintiff must prove at least five things and unless he does so he cannot succeed. He must prove that the defendant set the criminal law in motion against him. He must prove that the criminal proceedings against him terminated in his favour, that the defendant had no "reasonable and probable cause" for setting the law in motion against him and that the plaintiff was **actuated by malice in the sense that he had a motive other than only to carry the law into effect.** And for historical reasons (the action was originally in case) he must prove damage.
>
> (emphasis added)

[72] The five essential elements of the tort of malicious prosecution that the plaintiff needs to prove are:

(i) the defendant set the criminal law in motion against the plaintiff;

(ii) the proceedings terminated in the plaintiff's favour;

(iii) the defendant did not have any reasonable or probable cause for setting the law in motion against the plaintiff;

(iv) the defendants were actuated by malice in the sense that they had a motive other than to carry the law into effect; and

(v) the plaintiff suffered damage.

[73] In the present case, it is undisputed that P was charged under s. 124L of the Penal Code and was acquitted on 12 May 2017. Thus, the first and second elements of malicious prosecution mentioned above are fulfilled.

No Reasonable And Probable Cause

[74] In respect of the third element of malicious prosecution, I am satisfied that the offence charged against P under s. 124L of the Penal Code was made without reasonable and probable cause.

[75] With regard to the meaning of 'reasonable and probable cause', the Federal Court in *Rawther* (*supra*) quoted the following (at p. 204):

> I should define reasonable and probable cause to be, an **honest belief in the guilt of the accused** upon a full conviction, **founded upon reasonable grounds,** of the **existence of a state of circumstances, which, assuming them to be true, would reasonably lead** any ordinarily prudent and cautious man, placed in the position of the accuser, **to the conclusion that the person charged was probably guilty** of the crime imputed.
>
> (emphasis added)

[76] P was initially arrested and investigated under s. 124C of the Penal Code. The defendants then changed the investigation to ss. 124K and 124L of the Penal Code. P asserts that this was an afterthought and done deliberately in order to use SOSMA against him.

[77] In his witness statement (WSDW3), D5 stated that he was merely following instruction in prosecuting P. As he was not involved during the consideration and decision-making process to charge P under s. 124L of the Penal Code.

6 S: Apakah arahan yang Dato' berikan selepas dirujuk dengan Kertas Siasatan tersebut?

A: Pada ketika itu saya telah *mendapat arahan* daripada Dato' Sri Tun Majid Tun Hamzah, Timbalan Peguamcara Negara 1 (pada ketika itu), untuk mengendalikan pendakwaan ke atas Plaintif. Saya seterusnya telah menandatangani pertuduhan ke atas Plaintif.

7 S: Apakah pertimbangan yang dibuat oleh pihak pendakwaan dalam menuduh Plaintif [Pertama]?

A: Pada masa Kertas Siasatan dirujuk kepada saya, saya **telah pun mendapat arahan untuk menuduh dan mengendalikan pendakwaan ke atas Plaintif.** Oleh yang demikian, **keputusan untuk menuduh Plaintif dibuat tidak melibatkan saya dan saya tidak mempunyai pengetahuan** berkenaan dengan pertimbangan yang dibuat semasa keputusan untuk menuduh Plaintif dicapai. (emphasis added)

[78] The evidence given by D5 was unhelpful. During cross-examination, D5 concurred that he does not know the reason for such charge being preferred against P. And that the person who has such knowledge and can give evidence on the issue is the Timbalan Peguamcara Negara 1 at the material time.

Q: Saya kembali kepada Penyata saksi di perenggan 7, dengan jelas Dato' katakan disini "keputusan menuduh Plaintif, dibuat tidak melibatkan saya, dan saya tidak mempunyai pengetahuan berkenaan dengan pertimbangan yang dibuat semasa keputusan untuk menuduh plaintif dicapai,"

A: Ya.

Q: Setuju tak kalau saya katakan bahawa dengan penyataan yang jelas ini, maka, **pihak yang memberi keterangan berkaitan apakah asas membawa pertuduhan sedemikian terhadap plaintif adalah orang yang membuat keputusan tersebut,** setuju?

A: Ya.

Q: Dan setuju atau tidak menurut keterangan di sini, antara keterangan Dato' adalah **yang memberi arahan adalah Peguamcara Negara** satu pada masa itu, Dato' Majid, **orang yang boleh membantu Mahkamah untuk memahami apakah asas membawa pertuduhan** sedemikian terhadap Plaintif, adalah Tun Majid ataupun pegawai yang membantu beliau ketika penyediaan kertas pertuduhan tersebut setuju?

A: Setuju. (emphasis added)

[79] That seems to be a recurring theme among the defendants from the witness box. That they were merely following orders. 'Saya yang menurut perintah', as it were. Interestingly, the Government has replaced that phrase with 'Saya yang Menjalankan Amanah'. Perhaps to reflect the desire that every civil servant ought to carry out their duties in a trustworthy manner within the limits of authority. And not blindly follow orders.

[80] I had regard to the evidence that it was only on 24 March 2017 that the prosecution served on P the prosecution's documents pursuant to s. 51A(1)(b) of the CPC. (See Q&A 45 of P's witness statement WSPW2). The prosecution's documents were tendered more than one year after P was charged in court, with approximately 20 mentions in between. The documents provided by the prosecution, as listed below, do not contain anything which show 'sabotage' being attempted by P.

1. 'Lapuran Polis THSL repot: 31165/15' (*ie*, the Complainant Police Report).
2. 'Lapuran Polis Sri Hartamas repot: 325/15' (*ie*, the arrest report lodged by D1 on 18.9.2015).
3. 'Lapuran Polis THSL repot: 31283/15' (*ie*, a corrective report lodged by D1 on 19.9.2015).
4. 'Lapuran Polis Sri Hartamas repot: 371/15' (*ie*, a report lodged by D2 on 21.9.2015 regarding a police search of P's residence).
5. 'Lapuran Polis Sentul repot: 16899/15' (*ie*, the arrest report lodged by D2 on 23.9.2015).
6. 'Lapuran Polis Sentul repot: 17764/15' (*ie*, a corrective report lodged by D2 on 7.10.2015).
7. Salinan Percakapan 112 Khairuddin bin Abu Hassan.
8. Salinan pasport Khairuddin bin Abu Hassan.

[81] During cross-examination, it was further established that the prosecution's documents did not consist of the five reports that P had lodged abroad. D5 testified as follows:

> Q: Ya, Tapi dalam kes ini, isu ia tergolong di dalam SOSMA atau tidak tiada kaitan dengan keperluan jika ada keperluan untuk membuat siasatan.
>
> Betul? Sebab kalaupun tindakan ini tiada dalam SOSMA pun, pertuduhan masih akan berjalan di bawah seksyen 124 di Mahkamah Sesyen Kuala Lumpur.
>
> A: Ya.
>
> Q: Jadi kalau keadaan itu, Kalau perlu ada siasatan, pihak polis perlu teruskan siasatan mengikut arahan ...

Dan seperti yang Dato nyatakan tadi walaupun Dato tak pasti apakah arahan sebenar *inaudible* dan tak dapat ingat butiran, tapi Dato' pasti ada arahan diberikan untuk membuat siasatan.

A: Ya.

Q: Dan berpandukan arahan Timbalan Pendakwa Raya sepatutnya pihak siasatan meneruskan memperolehi siasatan tersebut.

A: Betul.

Q: Saya juga mencadangkan bahawa k*elima-lima Laporan polis di negara luar yang terkandung di dalam kertas pertuduhan yang telah kita rujuk tadi iaitu di Perancis, Switzerland dan sebagainya tidak langsung terkandung di dalam kertas siasatan* mulai dari tarikh pendakwaan sehingga ditarik balik pendakwaan setuju tak setuju?

A: Saya tidak dapat memberi kepastian berhubung perkara tersebut.
(emphasis added)

[82] Recall that the justification given by D3 for issuing the 28-day detention order under SOSMA was among others for further investigation, to gather documents from abroad and record statements from witnesses. Yet, nothing was produced in that regard. The prosecution's documents, as listed above, consist only of police reports and corrections lodged by the Investigating Officers (D1 and D2) themselves pertaining to their arrest and detention of P. It would appear that the defendants have nothing to show from their further investigation. The defendants have failed to satisfy me with sufficient particulars and material evidence of P's activities to justify his arrest and detention.

[83] The purpose and objective of SOSMA is to combat terrorism. It is aimed at curbing terrorist activities and organised violence. Notably, s. 4(3) of SOSMA stipulates that "No person shall be arrested and detained under this section solely for his political belief or political activity." I find it incredulous how P's activities in lodging his P police report and the reports abroad and voicing his concerns about the 1MDB issue, can be construed as acts of terrorism or violence.

[84] In the circumstances, I consider that P has discharged his burden of proving that the offence charged against him under s. 124L of the Penal Code was made without reasonable and probable cause. Since the defendants had failed to call the relevant witness who has personal knowledge of the 'reasonable and probable cause' in question. Hence, the assertion of P on the issue of there being no reasonable and probable cause for his prosecution remains unrebutted. That there was no reasonable and probable cause to charge P with s. 124L of the Penal Code becomes more evident when the prosecution dropped the charge against P and requested for discharge not amounting to acquittal on 12 May 2017.

Absence Of Malice

[85] In respect of the fourth essential element of malicious prosecution however, I am not convinced that the defendants were actuated by malice in the sense that they had a motive other than to carry the law into effect. At the outset, it must be pointed out that 'reasonable and probable cause' and 'malice' are two separate elements and requirements. Both must be proven in order to succeed in establishing the tort of malicious prosecution.

[86] In this regard, the decision of the High Court of Australia (on appeal from the Supreme Court of New South Wales) in *A v. State of New South Wales & Anor* [2007] HCA 10 ("*A v. NSW*") is instructive. There the court held that the elements of 'reasonable and probable cause' and 'malice' are separate elements and serve different purposes.

> 117. The four elements for the tort of malicious prosecution, stated at the outset of these reasons, remain. In particular, elements three and four, the **elements of malice and absence of reasonable and probable cause, serve different purposes and remain as separate elements which a plaintiff must prove in order to succeed in establishing the tort.** (emphasis added)

[87] As observed by the Federal Court in *Rawther*, there are two competing needs in play. On the one hand, the need to protect the reputation of the individual against unjustified criminal proceedings. On the other hand, the need to afford protection to persons who, whatever their real motives, assist in the administration of public justice.

[88] In *A v. NSW*, the High Court of Australia explained that the two requirements of 'reasonable and probable cause' and 'malice' represent the balance that is struck.

> 51. … Much of the development of the law concerning malicious prosecution reflects the attempts to *balance the provision of a remedy where criminal processes have been wrongly set in train with the need to deter the proper invocation of those processes.* The *two requirements of absence of reasonable and probable cause, and malice, represent the particular balance that is struck.*
>
> …
>
> 54. It is on this basis that the tort has hitherto been understood as *requiring proof of two distinct elements, one positive (malice) and the other negative (absence of reasonable and probable cause).* The two requirements meet the two different kinds of case posited in *Johnstone v. Sutton* – maliciously taking up a prosecution "for real guilt", and proceeding upon apparent guilt from circumstances which the prosecutor "really believes". That is, *the positive requirement of malice, and the negative requirement of absence of reasonable and probable cause, each have a separate role to play in the tort.* A conclusion about malice does not render irrelevant the inquiries about what the prosecutor did make, and should have made, of the material available when deciding whether to initiate or maintain the prosecution.

A

55. For immediate purposes, it suffices to describe *malice as acting for purposes other than a proper purpose of instituting criminal proceedings.*

56. Even if a prosecutor is shown to have initiated or maintained a prosecution maliciously (for example, because of *animus* towards the person accused) and the prosecution fails, an action for malicious
B prosecution should not lie where the material before the prosecutor at the time of initiating or maintaining the charge both persuaded the prosecutor that laying a charge was proper, and would have been objectively assessed as warranting the laying of a charge. (emphasis added)

[89] As to the question of what constitutes malice, the High Court of
C Australia said that "malice is demonstrated by showing that the Prosecutor acted for purposes other than a proper purpose of instituting criminal proceedings". "At the root of it is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law".

D **[90]** The High Court of Australia discouraged attempts to relate what will suffice to prove malice to what will suffice to prove absence of reasonable and probable cause. It said:

90. *No little difficulty arises, however, if attempts are made to relate what will suffice to prove malice to what will suffice to demonstrate absence of reasonable and probable*
E *cause.* In particular, *attempts to reduce that relationship to an aphorism* – like, absence of reasonable cause is evidence of malice, but malice is never evidence of want of reasonable cause – *may very well mislead.* Proof of particular facts may supply evidence of both elements. For example, if the plaintiff demonstrates that a prosecution was launched on obviously insufficient material, the insufficiency of the material may support an
F inference of malice as well as demonstrate the absence of reasonable and probable cause. *No universal rule relating proof of the separate elements can or should be stated.*

91. What is clear is that, *to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law*
G – an "illegitimate or oblique motive". *That improper purpose must be the sole or dominant purpose actuating the prosecutor.*

92. Purposes held to be capable of constituting malice (other than spite or ill will) have included to punish the defendant and to stop a civil action brought by the accused against the prosecutor. But because there is no limit to the kinds of other purposes that may move one person to
H prosecute another, *malice can be defined only by a negative proposition: a purpose other than a proper purpose.* (emphasis added)

[91] Finally, an observation of the High Court of Australia regarding the different meanings of malice in different branches of law is noteworthy. The court said:

I

186. It is necessary to say only a little about the other matter that was argued. **Malice may have different meanings in different branches of the law.** For example, in defamation, knowledge of falsity, or an absence of belief in the truth of the publicised material, may constitute it, as will spite or ill will. Recklessness too can amount to malice in defamation and, in my opinion, may do so in cases falling short of wilful blindness or the like.

187 **Malice in a case of malicious prosecution may, however, be established if some collateral purpose is shown to have provoked or driven the prosecution.** That does not mean that a person bringing a prosecution who dislikes, perhaps even despises, the subject of it should necessarily on that account alone be adjudged to have brought it maliciously. If the charge is one that should have been laid according to the precept of Dixon J, the prosecutor's distaste for, or dislike of, the accused will be an incidental matter only. (emphasis added)

[92] It is my finding that P has failed to prove, on a balance of probabilities, malice on the part of the defendants. According to P, the prosecution against him was made solely to abet and provide fraudulent assistance to Najib, the then Prime Minister, Minister of Finance and Chairman of 1MDB. (See para. 40 of the amended statement of claim). And solely for the purpose of safeguarding the interest of Najib. (See para. 49 of the amended statement of claim and Q&A 40 of P's witness statement WSPW2). That averment forms the basis of the alleged 'malice'. To wit, that the malice or improper purpose here was an exercise of protecting Najib, purportedly carried out by the defendants.

[93] P during cross-examination testified as follows:

Q: Di para 40, di dalam Penyataan Tuntutan ada menyatakan Plaintif kini mengatakan *segala tindakan-tindakan penyalahgunaan undang-undang yang dilakukan oleh kesemua Defendan terhadap Plaintif adalah semata-mata untuk bersubahat dalam memberi bantuan dan curang kepada Datuk Seri Mohd Najib* selaku Perdana Mentari dan/atau Menteri Kewangan dan/atau Pengerusi Lembaga 1MDB berkenaan isu yang dibangkitkan oleh Plaintif melalui laporan-laporan polis seperti yang dinyatakan di perenggan 10-19 di atas, betul Datuk Seri?

A: Ya.

Q: Dan di Pernyataan Tuntutan yang sama juga di m/s 23 di perenggan 49 Penyataan Tuntutan, saya bacakan Datuk Seri di para 49, Plaintif juga mengatakan bahawa *segala tindakan salah atau curang yang dilakukan oleh kesemua Defendan adalah semata-mata untuk menjaga kepentingan Datuk Seri Mohd Najib* selaku Perdana Menteri dan/atau Menteri Kewangan dan/atau Pengerusi Lembaga 1MDB berkenaan dengan isu 1MDB, betul Datuk Seri?

A: Betul. (emphasis added)

[94] That, however, is a bare assertion which was unsupported by evidence. P has not established that the prosecution against him was driven by a collateral purpose of protecting Najib. P has not shown that the sole or dominant purpose actuating the prosecution against him was to cover up the activities of Najib. Notably, Najib is not a party to the suit.

[95] Overall, the evidence adduced by P does not prove malice on the parts of the defendants. I accept that the defendants did not have reasonable and probable cause. However, I do not accept that the defendants were actuated by malice, in the sense that they had a motive other than to bring an offender to justice and thereby aid in the enforcement of the law. In the premises, I dismissed P's claim for malicious prosecution.

General Damages

[96] I turn now to assess damages in respect of P's false imprisonment for about two months from 18 September 2015 to 18 November 2015. P seeks general damages of RM1,581,000. This is how he arrived at that figure.

> 63. Therefore, we submit that the Plaintiff is entitled for general damages in the amount of RM30,000 per day for 62 days of unlawful detention, which in total it would be the amount of RM1,860,000.
>
> 64. However, also adopting the need for necessary adjustment and consideration of aggravating factor as adopted by *Abd Malek Hussin* (*supra*) a reduction of 30% from the amount of RM1,860,000, which is RM558,000 would be a reasonable adjustment to the amount of damages.
>
> 65. However, we must also consider the aggravating factor of the hardship the Plaintiff had to go through as he is a public figure and being involved in the issue of Najib Razak's related matter has put the Plaintiff in the public eyes. Thus, he was put into odium and ridiculed in the eyes of public by the unlawful detention on the frivolous allegation of terrorist activities against the nation.
>
> 66. Furthermore, the Plaintiff was arrested and detained for terrorist activities in the nation and was seen as the enemy of the state. Therefore, considering the aggravating factor and in line with the principle in *Abd Malek Hussin* (*supra*), we submit that the Plaintiff is entitled to an increase of 15% of the amount RM1,860,000 which is RM279,000.
>
> 67. To conclude on the issue of unlawful detention, it is our humble submission that the Plaintiff is entitled to the general damages in the sum of RM1,860,000 - RM558,000 (adjustment of 30% of RM1,860,000) + RM279,000 (aggravating factor of 15% of RM1,860,000) = RM1,581,000.

[97] To my mind, the claim of RM1,581,000 is exorbitant. Notwithstanding P's submission that he is being "magnanimous" in the amount claimed. No doubt, P is entitled to general damages for his false imprisonment. But the amount of damages must be reasonable and not excessive. I am guided by the observation of the Federal Court in *Yang Salbiah & Anor v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292 at p. 293:

> It must be remembered that the purpose of damages is to try, so far as humanly possible, to put the victim back to the position he would have been in but for the accident. The **damages must be fair, adequate and not excessive.** (emphasis added)

[98] Furthermore, damages serve as compensation. In the present context, to compensate P for his injury and the loss of his freedom during those two months. That said, damages are not a form of reward or enrichment for P. I should not be swayed by sympathy. In this regard, the observation of the Federal Court in *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885; [2016] 2 MLJ 1 at p. 894 (CLJ); p. 10 (MLJ) is useful:

> [20] It is trite that **damages serve as compensation, not a reward,** less still a punishment (see *Ong Ah Long v. Dr S Underwood* [1983] 2 MLJ 324). In assessing damages, the **courts should not be motivated by sympathy** and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation. (emphasis added)

[99] P's claim of RM30,000 per day for 62 days of unlawful detention is derived from the High Court case of *Abd Malek Hussin* (*supra*) at p. 287 as follows:

> [52] Encik Sivarasa, the learned counsel for the plaintiff, after referring to several case authorities, submits that the appropriate **amount for an unlawful detention of 24 hours in Malaysia would be in the region of RM25,000 to RM30,000.** He concedes that an award for a period of 57 days **should not be a simple arithmetic calculation but would also have to be adjusted.** The learned counsel submits that a simple mathematical approach gives 57 multiplies by (say) RM25,000 which amounts to RM1,425,000. He, however, submits that an **appropriate amount would be about half of that sum,** that is to say, RM700,000. In my judgment this is a reasonable proposition.
>
> [53] Encik Sivarasa further submits that there are **a number of significant aggravating factors in the treatment of the plaintiff during the detention** as detailed above in this judgment. The aggravating factors are the breach of the plaintiff's constitutional and fundamental rights, including right of access to counsel; the denial of access to family members within a reasonable time and frequency of the visits; the length of the period of solitary detention; the interrogation for 19 days on matters not related to

> internal security; the repeated assault of being handcuffed and blindfolded each time the plaintiff was moved from his cell, which is a distressing experience; and the injury to the plaintiff's reputation as a consequence of the arrest and detention. The learned counsel submits that the total amount of general damages for false imprisonment taking into account such aggravating factors should be increased to RM1,500,000. I am in agreement that there are aggravating factors and that the amount of RM700,000 should be increased taking into account these aggravating factors. But I think increasing the amount of RM700,000 to RM1,500,000 is rather too excessive. In my judgment, taking into account the aggravating factors, the award for false imprisonment should be increased from RM700,000 to RM1 million.
>
> (emphasis added)

[100] Firstly, I prefer the approach of a lump sum award. Rather than a simple arithmetic calculation based on a sum of RM30,000 per day (which seems rather arbitrary) multiplied by the number of days of detention. Secondly, the *Abd Malek Hussin* (*supra*) case relied upon by P adopted a downward adjustment of about half (50%). P however proposed a lesser reduction of 30% in his case. Thirdly, P seeks an increase of 15% on account of aggravating factors. Without in any way belittling his unfortunate experience, I note that there is no allegation of assault and battery or ill treatment of P whilst he was in detention.

[101] In para. 60 of the amended statement of claim, P pleaded that he "has suffered irreparable loss and/or pain and/or suffering". However, no evidence was tendered to prove the pain and suffering suffered by P. I echo the remarks of the High Court in *Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman & Anor* [1999] 1 LNS 83:

> In this case the Plaintiff in his Statement of Claim alleged to having suffered "mental distress, humiliation, and injury" and "loss of promotion opportunities" arising from the criminal charges preferred but has not given any particulars neither was any evidence led nor any document produced in support of his claim as to damages, ...
>
> I hold that the failure on the part of the Plaintiff to lead evidence or produce documents to determine quantum allegedly due to him is fatal to the Plaintiff's case. At the end of trial as there was no evidence to support the Plaintiff's claim as to damages. I hold that the Plaintiff has therefore not discharged the onus on him and accordingly not entitled to any.

[102] In para. 61(c) of the amended statement of claim, P had pleaded a separate claim of "general damages for pain and/or suffering and/or injury to the plaintiff's reputation from 18 September 2015 until 12 May 2017 amounting to RM1.5 million'". But P did not pursue that claim in submissions.

[103] In Q&A 47 of his witness statement WSPW2, P alludes to various losses suffered by him. He speaks of loss of dignity and public suspicion of his character in being perceived as a traitor to the nation. I accept that there is injury to his reputation. But I do not accept his other assertions therein concerning loss of business and loss of income, which are unsubstantiated. P alleges that prior to his arrest, he was appointed by a "syarikat keselamatan" as a director with a monthly director's allowance of RM10,000. He failed however to identify the "syarikat keselamatan" in question. P further alleges his loss to be RM40,000 per month but failed to particularise and prove the same. Lastly, P refers to the loss of a condominium which was foreclosed upon and in the process of being auctioned off by a bank. But failed to provide documentary evidence of the same.

[104] In my opinion, a lump sum award would be appropriate in the present case. This avoids a mathematical calculation using an arbitrary sum, whether it be RM25,000 to RM30,000 or any other figure. It also has the advantage of not having to do a downward or upward adjustment, whether 30% or 15% or any other arbitrary percentage. I have taken into account relevant factors including P's loss of liberty, length of his detention and injury to his reputation. Considering the circumstances of this case, my view is that a lump sum of RM300,000 would be reasonable as compensation for P's false imprisonment.

[105] My approach is this, I think an award for false imprisonment should lie somewhere in between: (i) an award for death in custody on the one hand; and (ii) an award for defamation on the other hand. The thinking being that loss of liberty for a period of time (in this case, two months) is less severe than loss of life whilst in detention. But more serious than injury to reputation in being defamed. Damages of course are at large. The range of damages awarded for death in custody and defamation cases is quite varied. That is to be expected as each case must be determined based on its own facts and circumstances.

[106] With regard to death in custody, s. 7 of the Civil Law Act 1956 also comes into play. Which entitles the deceased estate to a dependency claim for loss of support using a prescribed formula of: (i) a multiplier based on the age of the deceased; and (ii) a multiplicand based on the earnings of the deceased, as well as bereavement. I had regard to the trend of awards in defamation cases and aimed at an amount higher than that. On balance, I am of the view that a sum of RM300,000 would be fair for P in the circumstances of this case.

[107] Before leaving this point of general damages, I would mention that P also seeks a sum of RM14,764,500 as general damages for malicious prosecution. This figure is arrived at by applying the same formula which P

had used in his claim for damages in respect of unlawful detention, as discussed earlier. Namely RM30,000 per day multiplied by 579 days of malicious prosecution (from 12 October 2015 until 12 May 2017) with a 30% downward adjustment and a 15% aggravating factor increase. This is a reduction from the pleaded sum of RM50,000 per day in the amended statement of claim. At para. 61(b) of the amended statement of claim, P sought "general damages at the rate of RM50,000, for each day of unlawful arrest, malicious prosecution and/or negligence from 12 October 2015 until 12 May 2017 amounting to RM28,900,000".

[108] Given my finding on the issue of liability for malicious prosecution, it is unnecessary for me to assess this head of damage. But if I am wrong on liability, I would not have awarded the claim of RM14,764,500 in any event. Which I consider to be manifestly excessive. As explained earlier, I would favour a lump sum award rather than one using a mathematical formula.

Exemplary Damages

[109] P seeks exemplary damages of RM2.6 million. It is not explained how this sum was arrived at. P contends that the acts committed by the defendants are oppressive, arbitrary or in breach of the Federal Constitution against him. I did not allow this claim for the following reasons.

[110] The law on exemplary damages was explained in the English House of Lords' case of *Rookes v. Barnard* [1964] AC 1129 which held that exemplary damages should be awarded only in two types of cases as follows:

> The first category is **oppressive, arbitrary or unconstitutional action** by the servant of the government.
>
> ...
>
> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.
>
> ...
>
> To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute. (emphasis added)

[111] Also illuminating is the House of Lords' statement in *Rookes v. Barnard* (*supra*) that three general considerations should always be borne in mind when awards of exemplary damages are being considered. Noteworthy is the second consideration that the power to award exemplary damages is a weapon that ought to be used with restraint and moderately.

> I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered.

> First, the Plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a Plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.
>
> Secondly, the **power to award exemplary damages constitutes a weapon that,** while it can be used in defence of liberty, as in the Wilkes cases, **can also be used against liberty.** Some of the awards that juries have made in the past seem to me to **amount to a greater punishment than would be likely to be incurred if the conduct were criminal** and moreover a **punishment imposed without the safeguard which the criminal law gives to an offender.** I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from **seeing that the weapon is used with restraint.** It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v. Gambling*, and **place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough.**
>
> Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the Defendant's conduct is relevant. (emphasis added)

[112] Equally useful is the following guidance laid down by the English Court of Appeal in *Thompson v. Commissioner of Police of the Metropolis* [1997] 2 All ER 762 with regard to assessing exemplary damages.

(i) Where exemplary damages are claimed and there is evidence to support such a claim, though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour by police officers which deserves the exceptional remedy of exemplary damages.

(ii) If aggravated damages are awarded, these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police and inevitably, a measure of punishment from the defendant's standpoint.

(iii) Exemplary damages should be awarded if, but only if, the compensation awarded by way of basic and aggravated damages is an inadequate punishment for the defendant.

(iv) An award of exemplary damages is in effect a windfall for the plaintiff,

(v) The sum awarded by way of exemplary damages should be sufficient to mark disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose.

[113] On the local front, the Court of Appeal in *Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors & Another Appeal* [2017] 1 LNS 500 had this to say regarding exemplary or punitive damages.

> [33] The **exemplary damages or punitive damages** – the two terms now regarded as interchangeable – are additional damages awarded with reference to the conduct of the defendant, to **signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant.** Exemplary damages may be awarded where the **defendant has acted with vindictiveness or malice, or where he has acted with a "contumelious disregard"** for the right to the plaintiff. The primary **purpose of an award of exemplary damages may be deterrent, or punitive and retributory,** and the award may also have an important function in vindicating the rights of the plaintiff. (emphasis added)

[114] I certainly do not think that the defendants acted vindictively or maliciously against P. Their actions can hardly be described as oppressive or arbitrary. There is no cause for me to signify disapproval, condemnation or denunciation of the defendants' conduct by punishing them with punitive damages. I am of the opinion that the circumstances of this case do not warrant an award of exemplary damages.

[115] P cited the High Court case of *Abd Malek Hussin* (*supra*) which awarded exemplary damages of RM1 million. But that case is distinguishable as it involved inhumane, cruel and despicable behaviour of the defendants there in torturing the plaintiff (see excerpt of the judgment below). The same cannot be said of the defendants here.

> [56] In the present case, the **behaviour of the defendants is inhumane, cruel and despicable,** as the plaintiff was not just arrested and detained unlawfully for 57 days but was also **subjected to a vile assault, unspeakable humiliation, and prolonged physical and mental ill-treatment.** The Special Branch Department of the Police Force must not only be neutral but must also be seen to be neutral and non partisan. It must be above politics. The practice of torture of any kind is to be detested. The despicable conduct of the then Inspector General of Police, Tan Sri Rahim Noor, was shameful and a disgrace. He had shown an extremely bad example to the thousands of men under his charge. The award of exemplary damages is necessary to show the abhorrence of the Court of the gross abuse of an awesome power under the Internal Security Act. Any gross abuse of this power (which clearly is the case here), therefore, must be visited with an award of exemplary damages to ensure that the extent of abuse is kept to the most minimal, if not eliminated completely. The practice of torturing detainees by the Police Force can never and should never be condoned by the courts. The court must show its utmost disapproval in no uncertain terms.
>
> (emphasis added)

Aggravated Damages

[116] P seeks aggravated damages of RM1 million. Again, it is not explained how this sum was arrived at. P argues that the act of the defendants in pursuing the charge against him in court for almost two years had aggravated the oppression towards him. That in pursuing the appeal to the Court of Appeal and Federal Court (on P's notice of motion with regards to s. 124L of the Penal Code not falling within the ambit of SOSMA), the defendants had acted in continuation and expansion and aggravated their malicious prosecution and abuse of process. I did not allow this claim for the following reasons.

[117] In *Sambaga Valli* (*supra*), the Court of Appeal explained aggravated damages as follows:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as **additional compensation** where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or **exacerbated by the exceptional conduct of the defendant.** (emphasis added)

[118] In *Thompson* (*supra*), the English Court of Appeal further laid down the following guidance with regard to assessing aggravated damages.

(i) Compensatory damages are of two types:

  (a) ordinary or basic damages. Which will depend on the circumstances and the degree of harm suffered by the plaintiff; and

  (b) aggravated damages. Which though compensatory and not intended as a punishment, will in fact contain a penal element as far as the defendant is concerned.

(ii) Aggravated damages can be awarded where there are aggravating features that would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to basic damages. The aggravating features include:

  (a) humiliating circumstances;

  (b) conduct of the defendant showing that they had behaved in a high-handed, insulting, malicious or oppressive manner, either in relation to the arrest or imprisonment or in conducting the prosecution;

  (c) the way the litigation or trial is conducted.

(iii) The aggravated damages ordinarily should not be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest. The total figure for basic and aggravated damages should not exceed what is fair compensation for the injury that plaintiff has suffered.

[119] I refer to the Singapore High Court case of *Tan Harry and another v. Teo Chee Yeow Aloysius and another* [2004] 1 SLR(R) 513 at p. 532 which quoted the following:

> [82] Thirdly, Dyson J also said:
>
> In *Rookes v. Barnard Lord Devlin* said that **aggravated awards** were appropriate where the manner in which the wrong was committed was such as to injure the plaintiff's proper feelings of pride and dignity or gave rise to humiliation, distress, insult or pain. Examples of the sort of conduct which would lead to these forms of intangible loss were conduct which was accompanied by **malevolence, spite, malice, insolence or arrogance.** In other words the type of conduct which had previously been regarded as capable of sustaining a punitive award. It would therefore seem that there are two elements relevant to the availability of an aggravated award, first, **exceptional or contumelious conduct or motive** on the part of the defendant in committing the wrong and second, intangible loss suffered as a result by the plaintiff, that is injury to personality. (emphasis added)

[120] For an award of aggravated damages, there must be exceptional or contumelious conduct or motive on the part of the defendants. In the present case, I am not convinced that there is any such conduct or motive on the part of any of the defendants. My opinion is that the circumstances of this case do not justify an award of aggravated damages.

[121] P's grievance here is centred around the defendants' pursuit of the charge against him under SOSMA for an offence under s. 124L of the Penal Code. His complaint being that this aggravated the malicious prosecution against him. However, I have made a finding that there is no malicious prosecution in the instant case. The defendants may have been misguided or overzealous in invoking the legal process against P. But it can hardly be said that their pursuit of the charge against P was accompanied by malevolence, spite, malice, insolence or arrogance.

Special Damages

[122] P seeks special damages of RM795,000 for legal fees in defending the proceedings instituted by the defendants against him. P claims that this sum was the fee agreed between him and his solicitors. P produced a letter dated 14 June 2017 ("fee letter") from his solicitors (who is also his counsel in this suit), which requested payment of the said sum. I did not allow this claim for the following reasons.

[123] Firstly, special damages must be pleaded and particularised. The amended statement of claim however did not contain any particulars of this special damages claim. All that the amended statement of claim pleaded was this (at para. 61(d) thereof):

> The **special damages** for all costs incurred by the Plaintiff including but without limitation to the **legal costs agreed** to be paid to the Plaintiff's solicitors at all material times during the cause of this action;
>
> (emphasis added)

[124] The statement of claim was filed on 4 May 2018. The fee letter dated 14 June 2017 was already in existence for almost a year before the filing of the statement of claim. Thus, it was entirely possible for P to plead the precise amount of special damages in the statement of claim. But he failed to do so. Such failure to specifically plead and particularise special damages, in my opinion, is fatal to this claim. As a result, it is not recoverable.

[125] I rely on the following authorities. In *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300, the Federal Court said (at p. 305):

> It is a well established principle that special damages in contrast to general damages, have to be **specifically pleaded and strictly proved …**
>
> The reason that special damages have to be specifically pleaded is to comply with its object which is to crystallise the issue and to enable both parties to prepare for trial … In special damages claims the **exact loss must be pleaded where the precise amount of item of damages has become clear before the trial** either because it has already occurred and so become crystallised or because it can be measured with complete accuracy … The purpose is to put the defendants on their guard and tell them what they have to meet when the case comes on trial. (emphasis added)

[126] In *Tan Lin Siew & Anor v. Syed Hussein Alwi* [1987] 2 CLJ 114; [1987] CLJ (Rep) 362; [1987] 2 MLJ 53, the Supreme Court cited the following (at p. 365 (CLJ); p. 55 (MLJ)):

> As regards the question of damages, I would put it in this way. Special damage in the sense of monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and **particularised.** … In my view, it is plain law – so plain that there appears to be no direct authority, because everyone has accepted it as being the law for last hundred years – that one can recover in an action only special damage which has been pleaded, and of course **proved**. (emphasis added)

[127] Secondly, these special damages claim was not strictly proved. No retainer agreement between P and his solicitors was tendered to show the basis of charging or calculating legal fees. Whether it was on an agreed fee basis, time based, charge out rates *etc*. Whether billing would be progressive, based on milestones or a lump sum. All that was produced is the fee letter, which only came into existence after the criminal case against P had ended. The fee letter stated that parties had discussed and agreed the legal fees. But it is unclear when such discussion and agreement took place.

[128] The defendants' argument is this. The amount of legal fees was not determined at first since it was on a '*pro bono*' basis. It was only on 14 June 2017 that the fee letter was sent to P. Which was more than a month after the criminal case had ended on 12 May 2017 at the Sessions Court. The defendants contend that the amount of the legal fees was determined as an afterthought.

[129] Further, the defendants point out that actual payment of the said legal fees was never made by P. It has not crystallised. Special damages is a concept of an actual loss. There was no loss here on the part of P. From the facts of the case, there was no response by P to pay the said legal fees. It may be inferred that P did not pay because from the start it was on a '*pro bono*' basis. Only after about four years from the fee letter, the issue of legal fees is now raised in this trial. Which appears rather contrived.

[130] I see the force of the defendants' argument. I reject these special damages claim on the grounds that it was not specifically pleaded nor strictly proven.

Conclusion

[131] For the reasons above, I allowed P's claim for unlawful detention and awarded him damages of RM300,000. I awarded interest at the rate of 5% per annum on the judgment sum from the date of judgment to the date of payment. I dismissed P's claim for malicious prosecution. I ordered the defendants to pay costs of RM50,000 to P.